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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY A. GUERRA, Defendant and Appellant.	A150152 (San Mateo County Super. Ct. No. SC083999)

A jury found defendant Timothy A. Guerra guilty of second degree murder in the stabbing death of Denis Meshchyshyn. He contends the trial court erred in not sua sponte instructing the jury on involuntary manslaughter as a lesser included offense of murder. Guerra also seeks remand to allow him to make a record of information relevant to his eventual youth offender parole hearing, and the Attorney General agrees a limited remand for this purpose is appropriate.

We will order a limited remand and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Around 7:30 p.m. on April 25, 2015, Belmont police responded to a reported stabbing at a Wendy's restaurant. The victim, Meshchyshyn, was found lying on the ground in a parking lot behind Wendy's. Two men were near the victim; Melkin Robleto was kneeling next to him, and Oscar Rivera was standing. Meshchyshyn's hands were pressed against his stomach and blood was coming out from between his fingers. Meshchyshyn was taken to the hospital, and he was pronounced dead at 8:28 p.m.

Guerra was charged with first degree murder (Pen. Code,[1] § 187, subd. (a)) with the special allegations that he personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury (§ 1203.075, subd (a)).

At the time of trial, Rivera was 21 years old. Rivera met Meshchyshyn in middle school and considered him a very close friend. Rivera was also friends with Robleto and Guerra.

Rivera testified that on April 20, 2015, Guerra told him he had given Meshchyshyn $10 for a ride to San Francisco, but Meshchyshyn never picked him up.[2] Guerra said he was going to talk to Meshchyshyn about it.[3]

On April 25, Guerra asked Rivera to let him know when he was going to be with Meshchyshyn. Rivera told Guerra that he and Robleto were going to meet Meshchyshyn behind Wendy's. Rivera and Robleto parked behind Wendy's and walked to the gas station to get cigarettes. They saw Guerra approaching by foot and asked him to join them. Meshchyshyn drove by on his way to the parking lot, and Guerra said he was going to talk to him. Guerra did not seem different from his normal appearance. Rivera and Robleto went to the gas station.

As Rivera and Robleto were walking back to the Wendy's parking lot, Rivera saw Meshchyshyn and Guerra. They were talking next to the driver's side of Meshchyshyn's car. Rivera saw Meshchyshyn nod his head and Guerra talking and shrugging his shoulders. Then, Rivera testified, "they got into a little struggle, and they went on the ground, and then right away [Meshchyshyn] starts running to us holding his stomach, and . . . I saw [Guerra] looking at [Meshchyshyn], and . . . I saw the handle of the knife as he

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[1] All further undesignated statutory references are to the Penal Code.

[2] As will be seen, Guerra testified in more detail about this incident. According to Guerra, he gave Meshchyshyn $10 on April 19 expecting Meshchyshyn to give him a ride the next day to "Hippy Hill" for "420."

[3] Asked if Guerra ever said what he planned to do when he met Meshchyshyn, Rivera responded, "Nah, he might have mentioned like he was going to come up to him and maybe they might start fighting or something, but, you know, it was over $10.00, and I honestly didn't think much of it."

put it away, and everything just happened so fast . . . ." Rivera thought the "struggle" started with Guerra shoving Meshchyshyn, and they "started punching each other." Rivera saw Guerra throw Meshchyshyn to the ground. Within seconds, Meshchyshyn got up and started running toward Rivera and Robleto with blood on his sweater. He told Rivera and Robleto he was dying and to tell his parents that he loved them.

At the time of trial, Robleto was 23 years old. He testified that Rivera was one of his best friends and Meshchyshyn had been one of his closest friends. Robleto also knew Guerra through Rivera but did not consider him a friend.

On April 25, Robleto and Rivera drove to Wendy's in Robleto's car. They planned to meet Meshchyshyn in the parking lot. Robleto and Rivera left the car and were walking to a gas station across the street when they saw Meshchyshyn driving toward them. Meshchyshyn called Robleto on his cell phone, and Robleto told him they were going to the gas station and he should park his car.

Guerra was also dropped off in the area. Robleto saw Guerra walking toward him and Rivera, and Robleto asked him to get cigarettes with them. Guerra said no, he was going to talk to Meshchyshyn.

Robleto and Rivera were at the gas station for about three minutes and then headed back to Robleto's car. Robleto testified that as they approached the parking lot, he saw Meshchyshyn struggling and ran to him. Meshchyshyn "had the guts coming out his stomach" and got on the ground and lay down. Guerra was standing nearby with a long chef knife in his hand, and then he ran away. Robleto called 911.

A forensic pathologist conducted an autopsy and concluded Meshchyshyn died from loss of blood from the stab wounds, which "resulted in shock, [and] collapse of the cardiovascular system." Meshchyshyn suffered five stab wounds. One wound in the upper abdomen went through the body wall, cut the left lobe of the liver, cut the distal part of the stomach, went through the gallbladder, and penetrated the right lobe of the liver. The pathologist estimated the depth of the wound was "4 to 5 inches or possibly even a little bit more." Another wound on Meshchyshyn's back was about two and three-quarters inches deep. The pathologist examined Meshchyshyn's hands and fingers

looking for bruises, especially over the knuckles. He found no evidence suggesting Meshchyshyn had used his hands to punch something. The pathologist also looked for defensive wounds on the hands and arms, which are common in stabbing victims, but Meshchyshyn showed no signs of such wounds.

The police found a knife in a hedge near the crime scene. It was a kitchen knife with a six-inch blade stained with blood on the blade and part of the handle.[4]

Extracted data from Meshchyshyn's cell phone showed a missed call and text from Guerra's cell phone on April 20 just after midnight, a text from Guerra's phone later that day at 1:17 p.m. reading, "Ayy you still down to pick me up?" and additional missed calls from Guerra's phone made between 1:45 p.m. and 9:42 p.m. Three days later at 2:13 p.m. on April 23, Guerra's cell phone sent a text to Meshchyshyn's phone that read "Foo," "ur" "fucked up. You just take my money like that. Ur" "a piece of shit." Later that afternoon, Meshchyshyn's phone called Guerra's phone multiple times, and it appeared the calls were unanswered. This was the sum total of the contact between Meshchyshyn's phone and Guerra's phone from April 20 to April 25.

Guerra testified in his own defense. He was 20 years old at the time of trial and 19 on April 25. Guerra testified he did not go to meet Meshchyshyn that evening with the intent to kill, stab, or wound him. His intention was to talk to him about getting his money back.

Guerra lived in Belmont with his grandmother from age 9 to 13, then he and his older brothers ran away from home for a few months, and then he lived with his father in

[4] A criminalist generated a DNA profile from a swab of the knife and determined the blood sample was a mixture of at least two contributors. The criminalist opined that Meshchyshyn was the major contributor and that Guerra's DNA was consistent with the minor contributor. The criminalist's statistical analysis indicated approximately 1 in every 3.3 million individuals would be a possible contributor to the minor DNA profile.

Turlock. Around March 2015, Guerra moved in with his friend Christian Nahlinder at Christian's parents' house in Belmont.[5]

Guerra testified he started carrying a weapon "way before [he] turned 18." He carried a weapon for protection when he lived in Turlock because there were "a lot of people getting . . . jumped or shot at or robbed." And he continued to carry weapons (such as "[k]nives, like a screwdriver, scissors, maybe even like a fork") whether he was in Belmont, Turlock, or elsewhere.

Guerra testified that Robleto and Meshchyshyn were his friends. On the night of April 19 at Rivera's house, he gave Meshchyshyn $10 for gas money so that Meshchyshyn would give him a ride to San Francisco the next day; they arranged a time and pick up spot. The next day, Guerra called and texted Meshchyshyn, but he did not respond. When he was not picked up, Guerra "felt mad" and "played," "like, people were just trying to get over on [him]."[6] He thought Meshchyshyn took his money but never intended to give him a ride. Sometime before April 25, Guerra told Rivera he "wanted to beat [Meshchyshyn]'s ass," which he testified meant, "Probably fight him." Guerra testified he took the knife he used to stab Meshchyshyn from the Nahlinders' kitchen two or three days before April 25. He testified the weapon he carried before the kitchen knife was a screwdriver.

On April 25, Guerra texted Rivera asking when he would be with Meshchyshyn. Rivera told him they were going to Wendy's, and Mats Nahlinder dropped Guerra off at

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[5] Christian lived with his parents and a brother. His father, Mats Nahlinder, testified that the family became very close with Guerra through his friendship with Christian.

[6] Christian also learned from Guerra that he was upset, frustrated, and angry with Meshchyshyn for not giving him a ride after Guerra gave him $10. Christian testified that Guerra said he wanted to fight Meshchyshyn or steal his car. Guerra seemed serious and angry enough to want to attack Meshchyshyn. Christian tried to talk him down, telling him there were more important things to focus on and $10 was not worth getting angry about. But Guerra's mood did not seem to change. Two days after Christian first heard from Guerra about Meshchyshyn not giving him a ride, Guerra still appeared angry about the incident.

the gas station nearby. Guerra went to talk to Meshchyshyn. He walked up to Meshchyshyn's car in the parking lot. He testified that he was not expecting a confrontation. He knocked on the window of the car, and Meshchyshyn opened the door and put his foot out.

Guerra said to Meshchyshyn, "Hey, where's my money at?" Guerra testified that Meshchyshyn responded, "What the fuck are you going to do? You going to shoot me?" Guerra then pulled out the knife from his pants pocket and said, "Just give me my money." In cross-examination, Guerra explained that he pulled out the knife because of what Meshchyshyn said and "the tone of voice that he used." Meshchyshyn's response sounded to Guerra like he was asking "what am I going to do about it."

According to Guerra, a family walked by, and so he leaned on the car and put the knife in front of him to hide it from the family. He testified, "I was looking back, and the family, like, walked by, and when I turned forward [Meshchyshyn] was already standing up, like, reaching for the knife." Guerra said, "What are you doing?" Meshchyshyn said, "If you do this, I'll fucking murder you." Then Meshchyshyn said, "Put the knife away and talk to me like a man."

Guerra testified, after Meshchyshyn said to put away the knife, "I looked down, and I tried to open my pocket and put the knife away." Then Meshchyshyn "started swinging at" Guerra with his fists. Guerra testified Meshchyshyn hit him three or four times, connecting with his ear, the side of his head, and his neck. Guerra testified, "I was looking down to put it away, and then he took off on me, and then I don't know. I guess my attention turned towards him, and I just—I was just swinging back." He admitted he caused the stab wounds depicted in autopsy photographs that the pathologist testified about, but he testified it was not his intention to stab Meshchyshyn at that time. Guerra thought the incident from him knocking on the car window to the end of physical contact took about 30 seconds and the "confrontation with the knife, with fists" lasted no more than five seconds. Meshchyshyn pushed past Guerra and lay down in the parking lot about six feet from Guerra.

Then Guerra saw Rivera and Robleto nearby. Guerra testified that Robleto said, "What the fuck, Tim?" and "Get the fuck out of here before I fuck you up." Guerra turned around and ran. He threw the knife in a bush where the police later found it. Guerra denied he had taken any alcohol or marijuana or other drugs the day he killed Meshchyshyn. He admitted that when he was arrested, he initially lied to the police and said he had not been to Belmont in a year.

Guerra agreed that when he had armed himself with a screwdriver in the past, he knew it could be used to stab someone "[i]n the body" if needed, and similarly scissors were useful as a stabbing implement. Guerra admitted that, before stabbing Meshchyshyn, he chose the largest knife in the knife block in the Nahlinders' kitchen and agreed that a bigger knife would do more damage than a smaller knife. Guerra was asked to demonstrate how he put the 12-inch kitchen knife in his pocket. He thought if he pressed down on the knife it would "[p]robably cut through my pocket," and he could not explain why his pants pocket had not ripped in the two or three days he said he was carrying around the knife before he killed Meshchyshyn. And, in spite of his testimony that he always carried a weapon, when he was arrested in Turlock four days after the killing, Guerra did not have a weapon on his person.

Guerra denied he was trying to hide the knife when he threw it in the bush. He testified that when he ran from the scene, he forgot the knife was in his hand. Guerra knew Meshchyshyn was on the ground bleeding, but he admitted he wasn't thinking about Meshchyshyn when he ran away. He knew he had not cut Meshchyshyn only "slightly." Guerra testified that when he said he "swung at" Meshchyshyn it meant the "same thing" as "plunging the knife into his abdomen." He admitted he stabbed Meshchyshyn and then stabbed him again four more times. Guerra's friends saw him not long after the stabbing, and he was not injured.[7]

[7] Two friends of Guerra from high school testified they drove to Belmont the night of April 25 and gave Guerra a ride to Turlock. They reported that Guerra seemed normal and had no signs of injury, although one of them noticed he smelled unusually strongly of body odor.

Guerra thought Meshchyshyn had disrespected him. Guerra talked about "beat[ing] [Meshchyshyn]'s ass" on April 20 "[j]ust out of anger." Guerra texted Meshchyshyn on April 23 saying "he's fucked up for taking my money and he's a piece of shit," because he was angry and he wanted to show Meshchyshyn he was angry. He felt Meshchyshyn "should have brought [him] the money back." When the family walked by in the parking lot and Guerra had the knife out, he "was thinking that they were going to see us arguing, and I had a knife in my hand." Guerra was thinking clearly when the family walked by. Guerra testified, when Meshchyshyn said, "You do this, I'll fucking murder you," he was surprised but not scared. When Meshchyshyn hit Guerra, it did not hurt, and Guerra knew that Meshchyshyn did not have a weapon. He testified he was having trouble remembering how he swung at Meshchyshyn. He said, "I wasn't aiming. I was just—I just thought I was hitting him." The prosecutor asked, "Are you telling us that you pulled a knife, forgot you had it, and then realized it after you stabbed [Meshchyshyn]; is that your testimony?" Guerra responded, "No."

The trial court instructed the jury on murder with malice aforethought (CALCRIM No. 520), first degree murder (CALCRIM No. 521), provocation (CALCRIM No. 522), and voluntary manslaughter based on heat of passion as a lesser included offense (CALCRIM No. 570).

Following six days of witness testimony (and most of another day taken up by closing arguments and instructions), the jury reached a verdict after less than three hours of deliberation. The jury found Guerra not guilty of first degree murder and guilty of second degree murder. It also found true the allegation that Guerra used a deadly and dangerous weapon, a knife, during the commission of the murder.

Guerra was sentenced to 16 years to life in prison.

DISCUSSION

A. *Trial Court's Failure to Instruct on Involuntary Manslaughter Sua Sponte*

Guerra's sole claim of trial error is that the court erred in not sua sponte instructing the jury on involuntary manslaughter as a lesser included offense of murder. He relies on *People v. Brothers* (2015) 236 Cal.App.4th 24, 34 (*Brothers*), in which the

Court of Appeal recognized "an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony."[8] We conclude the evidence at trial did not require the trial court to give such an instruction and, further, even assuming such an instruction was merited, the assumed instructional error was harmless.

1. Background

In a discussion on jury instructions outside the presence of the jury, defense counsel told the court she intended to argue self-defense and accident or misfortune. She requested instructions on justifiable homicide: self-defense (CALCRIM No. 505), voluntary manslaughter: imperfect self-defense (CALCRIM No. 571), and excusable homicide: accident (CALCRIM No. 510).

The defense theory was that Guerra was retreating from the confrontation with Meshchyshyn when he was physically attacked. Defense counsel argued, "[Guerra] reasonably responds to the attack by punching and swinging. Unfortunately, he had a knife in his hand. He was not cognizant of it, and that is the accident or misfortune, but he had a right to defend himself from the blows . . . ." She claimed there was "no mens rea for murder." The trial court refused to give the requested instructions, and this ruling is not challenged on appeal. The jury was instructed on provocation reducing murder to manslaughter and voluntary manslaughter based on provocation or heat of passion.

[8] In the discussion that follows, we consider unlawful killings that result from *assaultive* felonies that are inherently dangerous because, generally, "under the felony-murder rule, a defendant who kills in the commission of an inherently dangerous felony not enumerated in section 189 [defining first degree felony murder] is liable for second degree murder." (*People v. Bryant* (2013) 56 Cal.4th 959, 966 (*Bryant*).) There is an exception, however, for assaultive felonies. If a defendant kills in the commission of an "inherently dangerous felony [that] 'is assaultive in nature' [citation], the felony-murder rule does not apply, and a defendant may not be found guilty of murder without proof of malice." (*Ibid.*)

2. The Trial Court's Duty to Instruct on General Principles of Law

" 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.] 'To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.' " (*People v. Souza* (2012) 54 Cal.4th 90, 115–116.)

" ' "Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.' " [Citation.] This substantial evidence requirement is not satisfied by " '*any* evidence . . . no matter how weak,' " but rather by evidence from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." [Citation.] "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." ' " (*People v. Souza*, *supra*, 54 Cal.4th at p. 116.)

3. Evolving Law on Killing During Inherently Dangerous Assaultive Felony

Guerra was charged with murder. "Murder is defined as 'the unlawful killing of a human being, or a fetus, with malice aforethought.' [(§ 187, subd. a).)] Malice aforethought 'may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' (§ 188.) . . . [The California Supreme Court has] 'interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of

another and . . . acts with a conscious disregard for life.' " ' " (*Bryant, supra*, 56 Cal.4th at pp. 964–965.)

"Both voluntary and involuntary manslaughter are lesser included offenses of murder. [Citation.] When a homicide, committed *with malice*, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is 'negated' or, as some have described, 'mitigated'; and the resulting crime is voluntary manslaughter, a lesser included offense of murder. [Citations.] [¶] Involuntary manslaughter, in contrast, [is an] unlawful killing of a human being *without malice*. (§ 192.) It is statutorily defined as a killing occurring during the commission of 'an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, [accomplished] in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).) Although the statutory language appears to exclude killings committed in the course of a felony, the Supreme Court has interpreted section 192[9] broadly to encompass an unintentional killing in the course of a noninherently dangerous felony committed without due caution or circumspection." (*Brothers, supra,* 236 Cal.App.4th at pp. 30–31, italics added.)

Left unanswered by the Penal Code, however, is the following question: what crime has been committed when a victim is unlawfully killed during a defendant's commission of an inherently dangerous assaultive felony but the defendant has neither

[9] Section 192 provides that there are three kinds of manslaughter: (1) voluntary, (2) involuntary, and (3) vehicular. Involuntary manslaughter is an unlawful killing "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) In addition, the California Supreme Court has recognized that "an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection," even though such a homicide "does not appear to be precisely within one of [the] descriptions" of section 192. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

express nor implied malice? And, at least until recently, case law on the issue has not provided a clear answer either.

In *People v. Garcia* (2008) 162 Cal.App.4th 18, 22 (*Garcia*) disapproved of in *Bryant, supra,* 56 Cal.4th at page 970, the defendant Garcia was convicted of voluntary manslaughter after he hit the victim with the butt of a shotgun, causing the victim to hit his head on the sidewalk and die. On appeal, the reviewing court rejected Garcia's argument that the trial court erred in declining to instruct the jury on involuntary manslaughter. In reaching its conclusion in 2008, the *Garcia* court held, "[a]n unlawful killing during the commission of an inherently dangerous felony [such as the assault with a deadly weapon or firearm], even if unintentional, is at least voluntary manslaughter." (*Ibid*.)

Five years later, the Supreme Court in *Bryant* disapproved *Garcia*. (*Bryant, supra,* 56 Cal.4th at pp. 970–971.) The court explained, "A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter." (*Id*. at p. 968.) But "[a] defendant who has killed without malice in the commission of an inherently dangerous assaultive felony must have killed without either an intent to kill or a conscious disregard for life. Such a killing cannot be voluntary manslaughter because voluntary manslaughter requires either an intent to kill or a conscious disregard for life." (*Id*. at p. 970.) But the court did not explain what crime such a killing would be.

Concurring in *Bryant*, Justice Kennard wrote separately to set forth her view that, when a defendant acts without malice, "an assault with a deadly weapon [can] constitute an unlawful act that makes a killing occurring during the assault *involuntary* manslaughter." (*Bryant, supra,* 56 Cal.4th at p. 971 (conc. opn. of Kennard, J.).) This is so even though assault with a deadly weapon is a felony and section 192 defines involuntary manslaughter to include an unlawful killing "in the commission of an unlawful act, not amounting to felony" because, Justice Kennard reasoned, the phrase "not amounting to felony" was simply a common law phrase that "served to distinguish

involuntary manslaughter from felony murder."[10] (*Bryant*, *supra*, 56 Cal.4th at p. 972 (conc. opn. of Kennard, J.).)

The concurrence concluded, however, that reversal was not required because the trial court could not have been expected sua sponte to instruct the jury on involuntary manslaughter as "a trial court has no duty to instruct on a legal principle that has been so 'obfuscated by infrequent reference and inadequate elucidation' that it cannot be considered a general principle of law." (*Bryant*, *supra*, 56 Cal.4th at p. 975 (conc. opn. of Kennard, J.).)

On remand from the Supreme Court, the defendant Bryant argued to the Court of Appeal "that the trial court erred in failing to instruct the jury sua sponte that an unlawful killing committed without malice in the course of an assaultive felony constitutes the crime of *involuntary* manslaughter." (*People v. Bryant* (2013) 222 Cal.App.4th 1196, 1200 (*Bryant II*).) But the *Bryant II* court concluded the trial court had no duty to give

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[10] The article "a" was added to the phrase "not amounting to felony" in 2015. (See Assem. Bill 2501 (2013-2014 Reg. Sess.) § 1.)

Justice Kennard further explained that the common law phrase "not amounting to felony" "eventually made its way into California's involuntary manslaughter statute." (*Bryant*, *supra*, 56 Cal.4th at p. 972 (conc. opn. of Kennard, J.).) Thus, "the phrase 'not amounting to felony' in the involuntary manslaughter statute (§ 192, subd. (b)) simply describes the difference between involuntary manslaughter and murder, namely, that a killing during an unlawful act 'not amounting to felony' is involuntary manslaughter, whereas a killing in the commission of certain felonies . . . constitutes the greater crime of murder." (*Bryant*, *supra*, 56 Cal.4th at p. 974 (conc. opn. of Kennard, J.).) "Any other conclusion would lead to the absurdity that a defendant who killed in the commission of a *less* serious unlawful act (i.e., a misdemeanor) could be convicted of involuntary manslaughter, but a defendant who killed in the commission of a *more* serious unlawful act (i.e., a felony) could not." (*Ibid*.; and cf. *People v. Burroughs*, *supra*, 35 Cal.3d at p. 835–836 ["the only rational interpretation of section 192 is that the Legislature intended felons [who kill in the commission of a noninherently dangerous felony] be susceptible to conviction for involuntary manslaughter"; it would be anomalous to hold "that while one who kills in the course of a lawful act without due caution and circumspection is guilty of involuntary manslaughter, one such as [the defendant], who allegedly commits a homicide while committing a noninherently dangerous felony, is guilty only, perhaps, of a battery"], fn. omitted.)

such an instruction sua sponte because there was no authority supporting it (at the time of the trial).[11] (*Id*. at p. 1206.)

Most recently, this issue (what type of crime has been committed when a defendant kills in the commission of an inherently dangerous felony but lacks malice) was addressed in *Brothers*, *supra*, 236 Cal.App.4th 24. In that case, the defendant Brothers learned information that caused her to believe the victim Gates, who was living in her house, had sexually molested her granddaughter and another child. (*Id.* at p. 27.) Brothers immediately summoned Gates and questioned him about the alleged abuse. She testified that Gates did not deny the abuse and said he must have been drunk when it happened. Brothers became enraged and began beating Gates with a wooden broom handle. (*Id*. at p. 28.) Brothers' boyfriend and his adult nephew arrived at the house. Brothers told them Gates had molested the children, and they tied Gates up and moved him to the garage, where they hit and kicked Gates and burned him with cigarettes. Brothers admitted she participated in the beating but denied burning Gates with cigarettes. One of the men shoved a large cloth down Gates's throat, causing him to suffocate. Brothers said the entire incident happened very fast, and after a few minutes, she left the garage. She did not know if Gates was still alive when she left. (*Ibid*.)

The jury acquitted Brothers of murder, found her guilty of voluntary manslaughter, and found true the special allegation that she used a deadly or dangerous weapon.[12] (*Brothers*, *supra*, 236 Cal.App.4th at p. 29.) On appeal, Brothers argued the

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[11] The court assumed, but expressly did not decide, that the jury instruction Bryant proffered (an unlawful killing committed without malice in the course of an assaultive felony is involuntary manslaughter) was a correct statement of the law. (*Bryant II*, *supra*, 222 Cal.App.4th at pp. 1200–1201, 1206, fn. 10.) In concluding the trial court was not required to instruct on involuntary manslaughter sua sponte in Bryant's case, the court observed that "the Supreme Court has repeatedly held that a legal concept that has been referred to only infrequently, and then with 'inadequate elucidation,' cannot be considered a general principle of law requiring a sua sponte jury instruction." (*Id*. at p. 1205.)

[12] Brothers was charged with first degree murder, and the jury was instructed on murder (CALCRIM No. 520), first degree murder by torture (CALCRIM No. 521), first

court erred in failing to instruct the jury sua sponte on involuntary manslaughter. (*Id*. at p. 26.) The Court of Appeal decided the issue Justice Kennard discussed in her *Bryant* concurrence but which was left undecided by the majority in *Bryant* and by *Bryant II*, that is, what is an unjustified homicide in the course of an inherently dangerous assaultive felony accomplished without malice? The court held such a killing is involuntary manslaughter. (*Id*. at pp. 33–34.)

Brothers argued the trial court had a duty to instruct the jury on involuntary manslaughter sua sponte, based on her testimony that she did not know " 'this was going to happen.' " (*Brothers, supra*, 236 Cal.App.4th at p. 34.) The court rejected her argument, reasoning, "Even crediting Brothers's testimony in its entirety, there was simply no evidence from which a reasonable juror could entertain a reasonable doubt that Brothers had acted in conscious disregard of the risk her conduct posed to Gates's life. Brothers's own account unequivocally established she engaged in a deliberate and deadly assault because she had been enraged, 'out of control,' and unable to calm herself. . . . There was no evidence of an accidental killing, gross negligence or Brothers's own lack of subjective understanding of the risk to Gates's life that her and her confederates' conduct posed. On this record, the trial court had no sua sponte duty to instruct the jury on involuntary manslaughter." (*Ibid*.)

The *Brothers* court further explained: "In sum, when the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault. [Citations.] However, when, as here, the defendant indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law, and no material

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degree felony murder by torture (CALCRIM Nos. 540A, 540B, 810), aiding and abetting (CALCRIM Nos. 400, 401), provocation reducing murder to manslaughter (CALCRIM No. 522) and voluntary manslaughter (CALCRIM No. 570). (*Brothers, supra*, 236 Cal.App.4th at p. 29.)

issue is presented as to whether the defendant subjectively appreciated the danger to human life his or her conduct posed, there is no sua sponte duty to instruct on involuntary manslaughter. [Citations.] Otherwise, an involuntary manslaughter instruction would be required in every implied malice case regardless of the evidence. We do not believe that is what the Supreme Court intended in *Bryant*." (*Brothers, supra,* 236 Cal.App.4th at p. 35.)

4. Analysis

We agree with *Brothers* that when a defendant commits an unlawful killing during an inherently dangerous assaultive felony but the defendant lacks malice, the defendant has committed involuntary manslaughter. (*Brothers, supra,* 236 Cal.App.4th at pp. 33–34; see *People v. Vasquez* (2018) 30 Cal.App.5th 786 [Dec. 27, 2018, No. B281178, p. 8, https://appellatecases.courtinfo.ca.gov] (*Vasquez*).) Consequently, when there is a material issue as to whether an unlawful killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense. (*Brothers,* at p. 35.)

Guerra contends his own testimony that stabbing Meshchyshyn was unintentional provided substantial evidence from which a reasonable jury could have concluded he assaulted Meshchyshyn with a knife without malice such that the trial court had a sua sponte duty to instruct on involuntary manslaughter. We disagree.

Guerra's testimony establishes he took a 12-inch kitchen knife with a six-inch blade and carried it around with him for days, while stoking his own anger at Meshchyshyn and waiting to confront him. When Guerra finally confronted Meshchyshyn and Meshchyshyn said something that Guerra took to mean "what [are you] going to do about it," Guerra responded by pulling out the knife. Upon seeing the knife, Meshchyshyn, according to Guerra, threatened to "fucking murder" Guerra if he stabbed him, and told Guerra to put the knife away. Guerra testified he looked down to put the knife away and Meshchyshyn started punching him. Guerra then threw "wild punches" at Meshchyshyn with his hand gripping the handle of the kitchen knife. Guerra admitted that he stabbed Meshchyshyn five times, including "plunging the knife into his

abdomen." Even under Guerra's version of events he "indisputably has deliberately engaged in a type of aggravated assault the natural consequences of which are dangerous to human life, thus satisfying the objective component of implied malice as a matter of law." (*Brothers*, *supra*, 236 Cal.App.4th at p. 35.) Nor is there a material issue as to whether he subjectively appreciated the danger to human life posed by his conduct. Guerra knew the knife was large and sharp and was worried that it could cut him. He agreed "a big knife is going to do probably more damage than a little knife" or some other tool.[13]

On appeal, Guerra claims Meshchyshyn's punches caught him by surprise and he swung back "unaware that the knife was still in his hand." He argues his testimony shows "he was unconscious of the nature of his act when he assaulted Meshchyshyn with the knife . . . ." Guerra cites various passages of the reporter's transcript to support his claim. Reviewing these citations, we see that Guerra testified he was trying to put away the knife "and then he took off on me, and then I don't know. I guess my attention turned towards him, and I just—I was just swinging back." When asked on cross-examination what his intent was when he swung the knife, Guerra responded, "I don't think I was thinking about the knife." When the prosecutor asked, "So you were thinking enough to hold the handle of the knife, right [and not the blade]?" Guerra responded, "Hum. I don't think I was thinking. I was just grabbing it."[14] Guerra testified, "I remember that I was getting hit, and I just swung back." And, "At that moment I wasn't paying attention to what I had in my hands. I was just swinging back." He admitted he stabbed Meshchyshyn in the back, and when asked how he did that, he answered, "I don't know. I think I was probably throwing wild punches."

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[13] Further, Guerra knew to hide the knife "[b]ecause people would think that's a weapon [he] might use to hurt someone" if people saw him carrying the knife.

[14] During this part of cross-examination, Guerra agreed that he could have dropped the knife to the ground, but he did not. Instead, he held the knife tightly, and after he plunged the knife into Meshchyshyn, he still did not drop the knife, but kept his fists closed. He testified, "Like I said, I don't remember stabbing him. I was just swinging it."

We conclude the evidence did not warrant a sua sponte instruction on involuntary manslaughter. True, Guerra testified he was not thinking much about the knife when he swung at Meshchyshyn and that, by the time of trial, he did not remember exactly how he stabbed Meshchyshyn. But the knife did not end up in Guerra's hand by accident: Guerra admitted he took the knife from the Nahlinders' kitchen and carried it for two or three days; he knew the knife was large and the blade was sharp; once in the parking lot, he purposely pulled out the knife so Meshchyshyn could see it; and he was thinking clearly when he lowered the knife to hide it from the view of a family passing by. Even crediting Guerra's testimony in its entirety, there was simply no evidence from which a reasonable juror could entertain a reasonable doubt that Guerra acted in conscious disregard of the risk his conduct posed to Meshchyshyn when, immediately after looking down at the knife, he threw punches at Meshchyshyn using the very hand that still gripped the knife, and swung so wildly and with such force that he inflicted five separate stab wounds, including a five-inch deep cut into Meshchyshyn's abdomen and a stab in his back).[15] Nor does Guerra's testimony suggest a case of accident or mere gross negligence. Guerra does not claim, for example, that Meshchyshyn walked into the knife.

Vasquez, *supra*, 30 Cal.App.5th 786, cited by Guerra during oral argument, is easily distinguishable. There, the defendant beat up the victim, who, unbeknownst to the defendant, had a "hidden spinal injury (metal rods had been placed in his neck in a prior surgery)." (*Id*. at p. __ [Dec. 27, 2018, No. B281178, p. 2,

[15] To the extent Guerra is suggesting an unconsciousness defense on appeal, the evidence does not support such a defense. "Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [Citations.] . . . [I]t can exist 'where the subject physically acts but is not, at the time, conscious of acting.' (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417.) Here, however, Guerra's "own testimony makes clear that he did not lack awareness of his actions during the course of the offenses." (*Id*. at p. 418 [defendant's lack of memory of certain details surrounding killings did not support an inference he was unconscious when he committed them].) Further, on cross-examination, Guerra expressly disavowed that he "pulled a knife, forgot [he] had it, and then realized it after [he] stabbed [Meshchyshyn]."

https://appellatecases.courtinfo.ca.gov].) The beating resulted in a fatal injury immediately adjacent to the metal rods, while the other injuries caused by the beating were relatively minor. Defense counsel requested an instruction on involuntary manslaughter on the theory the defendant was not subjectively aware his actions could be deadly to the victim, and the Court of Appeal held this request should have been granted. (*Ibid*.) The appellate court based its decision on the long-recognized rule "that not all beatings are life threatening." (*Id.* at p. __ [p. 11].) The *Vasquez* court quoted our high court, which has observed, " ' "if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder." ' " (*Ibid.*, quoting *People v. Cravens* (2012) 53 Cal.4th 500, 508.) But Guerra did not merely punch the victim with his fists. (Cf. *People v. Cook* (2006) 39 Cal.4th 566, 597 [no sua sponte duty to instruct on involuntary manslaughter where "[d]efendant did not simply start a fist fight in which an unlucky blow resulted in the victim's death. He savagely beat [the victim] to death" with a board].) He stabbed Meshchyshyn multiple times using a kitchen knife with a six-inch blade. He plunged the knife five inches into the victim's abdomen. Unlike a beating using fists only, multiple stabs inflicted with a six-inch blade into the abdomen of the victim are circumstances under which the law may well raise the implication of malice aforethought. (See *People v. Landry* (2016) 2 Cal.5th 52, 97 ["an assault with a knife may reflect implied malice"]; *People v. Pacheco* (1981) 116 Cal.App.3d 617, 627–628 [assault with a deadly weapon resulting in 45 stab wounds supported finding of implied malice].)

In sum, the evidence at trial did not raise a material issue as to whether the killing was committed without malice such that the trial court had a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense. (*Brothers, supra,* 236 Cal.App.4th at p. 35.)

Furthermore, even if we assume the evidence was sufficient to require an instruction on involuntary manslaughter, any error in failing to give that instruction was harmless. "The failure to instruct on a lesser included offense in a noncapital case does

not require reversal 'unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.' [Citation.] 'Such posttrial review focuses not on what a reasonable jury could do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. " (*People v. Thomas* (2012) 53 Cal.4th 771, 814.)

Here, the evidence supporting the jury's verdict was compelling. Guerra admitted he was angry with Meshchyshyn for not giving him a ride after taking his $10. Christian testified he tried to talk Guerra out of his anger, but Guerra remained angry for days, and talked about fighting Meshchyshyn or stealing his car. Guerra armed himself with a 12-inch kitchen knife, went to where he knew Meshchyshyn would be, and pulled out the knife after demanding Meshchyshyn give him his money. Then, when a family walked by, Guerra had the presence of mind to hide the knife so the passersby wouldn't see it. With that momentary obstacle out of the way, Guerra stabbed Meshchyshyn five times. Notwithstanding his claim that he was not thinking about the knife when he swung at the victim, Guerra admitted he was instantly aware that he had stabbed Meshchyshyn but did not try to help him or summon aid. Instead, he got rid of the knife and fled the area. Guerra testified Meshchyshyn punched him first, but Meshchyshyn's body showed no signs of having been in a fight, and friends who saw Guerra later that night saw no signs that Guerra had been punched. Instructed on first degree murder, second degree murder, and voluntary manslaughter based on heat of passion, the jury reached a verdict of second degree murder after less than three hours of deliberation. This strongly suggests the determination of whether malice was present during the killing was not a difficult

decision for the jury.[16] Based on the evidence presented, the jury was not reasonably likely to have convicted defendant of the lesser offense if instructions on involuntary manslaughter had been given.[17]

B. *Remand to Develop the Record for Eventual Youth Offender Parole Hearing*

Because Guerra was 19 years old at the time of the offense and he received a life term of less than 25 years to life, he will be entitled to a youth offender parole hearing during his 20th year of incarceration. (§ 3051, subd. (b)(2).) Guerra requests a remand

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[16] Guerra argues the jury was faced with an all-or-nothing choice between convicting him of a homicide offense or complete acquittal. This ignores that the jury was also instructed on the lesser offense of voluntary manslaughter. And had the jury struggled with the question whether Guerra harbored malice, it likely would have submitted questions to the trial court on the issue or, at the very least, spent longer deliberating. Given the absence of jury questions and the dispatch with which the jury reached its verdict, however, we reject Guerra's "all-or-nothing" argument because we see little likelihood that the jury in this case failed to find malice and only convicted Guerra of second degree murder to avoid acquitting him of any crime.

[17] We reject Guerra's argument that the alleged instructional error is federal constitutional error requiring analysis for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24. The federal "Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (*Patterson v. New York* (1977) 432 U.S. 197, 210.) Guerra argues the failure to give an instruction on involuntary manslaughter is constitutional error relying on *People v. Thomas* (2013) 218 Cal.App.4th 630. In *Thomas*, the Court of Appeal held it was federal constitutional error for the trial court to refuse to give a requested instruction on voluntary manslaughter based on provocation where there was substantial evidence of provocation; this was because the prosecution was required "to prove malice beyond a reasonable doubt by proving that sufficient provocation was lacking." (*Id.* at p. 643.) *Thomas* is inapposite because Guerra does not claim a similar error. To establish second degree murder, the prosecution here was required to prove Guerra harbored malice beyond a reasonable doubt, and the jury was properly instructed on malice with CALCRIM No. 520. The jury was also properly instructed on provocation. (CALCRIM Nos. 522, 570.) On appeal, Guerra does not claim that he acted with malice but that malice was negated or mitigated by some other circumstance as in cases of voluntary manslaughter. His claim is that he acted *without malice*, and the jury was properly instructed that it was the prosecution's burden to prove malice beyond a reasonable doubt. Even assuming an instruction on involuntary manslaughter was warranted in this case (and it was not), the alleged error would not be constitutional.

because defense counsel was ineffective in failing to make a record relevant to his eventual youth offender parole hearing, and the Attorney General concedes a remand is appropriate in this case.

We agree with the parties and order remand for the limited purpose of allowing the parties to make a record of information relevant to Guerra's eventual youth offender parole hearing. (*People v. Franklin* (2016) 63 Cal.4th 261, 286–287 and *People v. Costella* (2017) 11 Cal.App.5th 1, 10.)

DISPOSITION

The matter is remanded for the limited purpose of allowing the parties to make a record for Guerra's eventual youth offender parole hearing. In all other respects, the judgment is affirmed.

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Miller, J.

We concur:

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Kline, P.J.

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Richman, J.

A150152, *People v. Guerra*